No. 95-346

In the Supreme Court of the United States

OCTOBER TERM 1995

UNITED STATES, PETITIONER,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., RESPONDENTS

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR RESPONDENTS ARLT & WREN

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the *in rem* forfeitures of respondents' property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) violate the Fifth Amendment's protection against being twice placed in jeopardy of punishment for the same offense?

a. Do *in rem* forfeitures constitute "punishment," even if premised, *inter alia,* on a "proceeds" theory?

b. Did the government seek the forfeitures in a proceeding "separate" from the underlying criminal prosecution and sentencing?

c. Was the government's attempt to forfeit respondents' property premised on the "same offence" as respondents' criminal convictions, for which they were already serving life imprisonment?

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COUNTERSTATEMENT OF THE CASE

On June 12, 1991, a grand jury sitting in the Central District of California indicted respondents for conspiracy to manufacture methamphetamine [21 U.S.C. § 846], and 19 counts of money laundering [18 U.S.C. § 1956(a)(1)]. Pet. App. 79a-105a.

On June 17, 1991, the Petitioner commenced a civil forfeiture action against the defendant properties listed in the caption (hereinafter "the properties"). Pet. App. 30a-31a. The civil complaint alleged the same facts and same criminal violations set forth in the criminal indictment against respondents Arlt, Wren, and others. Pet. App. 33a-42a, 79a-105a. The government invoked *in rem* forfeiture statutes 21. U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) in the civil complaint. Petitioner has maintained possession of the properties since their seizure in July, 1991.

On March 27, 1992, respondents Arlt, Wren, and others were found guilty of the indictment charges. Pet. App. 106a-108a. On December 4, 1992, while Arlt and Wren were serving their sentences in prison, the government filed its motion for summary judgment in the forfeiture action. Resp. Arlt's Br. in Opp. 1a-29a. The government's "uncontroverted facts and conclusion of law" established its probable cause burden by using the criminal indictment, prosecution, jury verdict, and judgment and commitment as the grounds for summary judgment in the civil proceedings. Pet. App. 55a-72a.

On January 26, 1993, respondents Arlt and Wren, *pro se*, opposed the government's motion for summary judgment by vigorously disputing the government's alleged "uncontroverted facts." Resp. Arlt's Br. in Opp. 48a-54a. Respondents raised material questions of fact regarding whether the cash transactions were legal in themselves. Resp. Arlt's Br. in Opp. 31a-34a, 50a-52a.

On March 23, 1993, respondents Arlt and Wren moved to strike portions of the government's reply to claimants'

opposition to motion for summary judgment. Resp. Arlt's Br. in Opp. 58a-70a. Respondents' declaration and exhibits demonstrated a legal source of the vehicles, boat, airplane, personal property, silver bars, and money in several accounts. Resp. Arlt's Br. in Opp. 48a-52a. Respondents demonstrated the legal procedure they used when making chemical orders or cash purchases, and contended that use of cash is normal and not *per se* proof of mysterious drug activity. *Id.* The only fact not in dispute was that the government met its burden of proof of the probable cause for forfeiture based on precisely the same conduct and violation as in the criminal indictment, prosecution, and convictions of respondents Arlt and Wren. Pet. App. 61a-72a; Resp. Arlt's Br. in Opp. 58a-68a.

On April 1, 1993, the district court granted the government's motion for summary judgment and adopted in full the government's allegations in its "uncontroverted facts and conclusions of law" which incorporated the indictment and criminal prosecution. Pet. App. 75a-78a. Following the district court's denial of respondents' request for reconsideration, respondents filed a timely notice of appeal on June 15, 1993. The government argued, *inter alia*, that its burden of proof (probable cause) was satisfied by Arlt's and Wren's criminal indictment, prosecution, and convictions for the offenses underlying this forfeiture complaint. Resp. Arlt's Br. in Opp. 113a-114a.

On September 6, 1994, the Ninth Circuit panel ruled that multiple punishment occurred when a civil forfeiture under either 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is based on the same conduct as the claimants' criminal judgment and sentence. Pet. App. 1a-23a. The panel did not reach the merits of the respondents' other claims, but stated in footnote 2:

> Although the claimants relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause

> burden the government relies almost exclusively on Arlt's and Wren's criminal convictions.

Pet. App. 5a; see also Pet. App. 18a. The decision stated that the government invited the double jeopardy problem in order to "obtain a significant advantage":

> [I]f it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standard applicable in civil proceeds applied. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Case*, ¶ 10.01, at 10-4 to 10-5 (1993).

33 F.3d at 1217; Pet. App. 9a-10a.

In a footnote, the panel specifically noted the threatened abuses of the type of successive employed by the petitioners. Pet. App. 10a, n.6.

The government sought rehearing on October 14, 1994. The panel affirmed its opinion and amended with a one sentence notation that its categorical approach characterizing § 881(a)(6) as punishment was compelled by this Court's decision in *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). Pet. App. 25a. A dissent from the rehearing denial raised legal objections to the characterization of proceeds forfeitures as punishment and posed the specter of wholesale jail releases. Pet. App. 25a-29a.

The government filed its petition for certiorari on August 29, 1995. Certiorari was granted on January 12, 1996.

Introduction and Summary of Argument

This case arises out of the implication of several of this Court's recent decisions.

> "We know from *Austin v. United States*, [], 113 S. Ct. 2801 (1993), and *United States v. Halper*, 490 U.S. 435 (1989), that forfeiture and civil fines can be penalties for crime, and from *Halper* and *Dept. of Revenue of Montana v. Kurth Ranch*, [511] U.S. ___, 114 S. Ct. 1937 (1994), that a financial exaction (in *Kurth Ranch*, a tax imposed only on persons arrested for drug offenses) can count as a separate jeopardy. *Austin* involved 21 U.S.C. § 881, the same statute invoked to forfeit [the respondent properties]."

United States v. Torres, 28 F.3d 1463, 1464 (7th Cir. 1994). The holdings and logic of this Court's unanimous decisions in *Halper* and *Austin* dictate that the forfeitures imposed in this case were, at least in part, punitive. The government's two-punch strategy "twice" placed respondents Arlt and Wren "in jeopardy" of punishment for the "same offence." More than an abstract encounter with "jeopardy," the trial court's order granting summary judgment in favor of wholesale forfeiture of all the respondents' assets resulted in their being twice punished — in separate proceedings — for the exact same offenses for which they were serving life sentences. Under long–established precedent, extending back more than 120 years[1] ,the second punishment violated the Double Jeopardy Clause of the Fifth

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[1] *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Although this Court's precedents reach back over a century, the amendment's roots issue from earliest English law, *id.* at 168-69, derived from Roman law, and ultimately are traceable to Athenian law and Democracy's antiquity. Demosthenes, *Against Leptines*, ¶ 155, http://www.perseus.tufts.edu/cgi-bin/text?lookup= dem.+20.155 ("For you are of course aware that for each grave offense a single penalty is provided by the law, which says explicitly that 'at any trial there shall be not more than one assessment of penalty, whichever the court imposes, whether a personal punishment or a fine, but not both.'").

Amendment.[2]

The preeminent principle of the Double Jeopardy Clause is a limit upon the government's power to punish: "the government, with all its resources and powers, should not be allowed to make repeated attempts to punish an individual for the same offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *United States v. Dixon*, 509 U.S. 688, ___, 113 S.Ct. 2849, 2882 (1993) (Souter, J., concurring in part and dissenting in part); *Garrett v. United States*, 471 U.S. 773, 795-796 (1985) (O'Connor, J., concurring); *Ohio v. Johnson*, 467 U.S. 493, 498-499 (1984); *Burks v. United States*, 437 U.S. 1, 11 (1978). Petitioner challenges this commonsense conclusion and rewrites the entire body of relevant precedent. Failing a wholesale revision, petitioner then seeks to reconstruct the holdings of *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S. Ct. 2801 (1993), and *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), giving them a crabbed and fact-bound reading. Against petitioner's measure, these cases make little historical sense and bear little significance in the development of double jeopardy jurisprudence.

Principles of *stare decisis* alone require a principled adherence to these cases, for ultimately, if these holdings were diminished, the Double Jeopardy Clause would suffer "a narrow, grudging application." *Green*, 355 U.S. at 198.

The Petitioner then warns of dire policy ramifications if the Court does not bring these cases to rein. Respondent Ursery correctly characterizes petitioner's parade of horribles as no more than red herrings on parade. Ursery Br., § A.3. Most fundamentally, "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be

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[2] Altogether silent as to prongs and prosecutions, the Clause states: no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."

highly valued."*Green*, 335 U.S. at 198.

A. Forfeiture Under 21 881(a)(6) Is Punishment, Even If the Property Represents, In Whole or In Part, Proceeds of Criminal Activity.

Prior to *Halper*, proceedings which could result in punishment were either denominated by Congress as "criminal" or were of a nature so plainly akin to a prosecution that the proceeding was judicially deemed pervasively penal and invested with the full complement of due process guarantees. In *Halper*, this Court recognized that punishment for Double Jeopardy purposes may also be imposed through an inherently civil proceeding. *United States v. Halper*, 490 U.S. 435 (1989). Although such proceedings may fall short of the a prosecution and thus not implicate all the protections of the Sixth Amendment, they nevertheless implicated the Double Jeopardy Clause insofar as they threatened to impose a punishment "as we have come to understand the term." *Halper*, 490 U.S. at 448. After *Halper*, a civil proceeding raises double jeopardy concerns when either

(1) in the case of a wholly remedial statute, the sanction is disproportionate to the statute's remedial goal,[3] or

(2) in the case of a statute aimed at deterrence or retribution, the sanction is not justifiable solely by reference to its remedial goals[4],

so that the sanction may be said to be punishment. The denomination "civil" or "criminal" is not of paramount importance: the nature of the statute and its sanction control whether double jeopardy protection applies to successive proceedings.

Austin relied upon this Court's earlier determination in *Halper* that a penalty which Congress intended to be punitive, or

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[3] The so-called "rare case." Pet. Br. at 11; *Halper*, 435 U.S. at 449.

[4] A categorical test, not requiring the case-by-case analysis necessary to analyse the remedial-type sanctions.

which could not be justified for solely non-punitive purposes, is punishment under the Double Jeopary Clause. The historical understanding of forfeitures such as those in 21 U.S.C. § 881(a)(4) and (a)(7) confirmed that the statutes imposed punishment: they focused on the owner's culpability by authorizing the forfeiture only if the owner was tied directly tothe commission of a crime; and Congress intended that they serve the dual goals of punishment: retribution and deterrence.

There is nothing which differentiates property the government seeks to define as proceeds under 21 U.S.C. § 881(a)(6) from any other type of property subject to forfeiture, including conveyances, homes, instrumentalities, and all other porperty described in 21 U.S.C. § 881(a)(4), (a)(6), or (a)(7).

Every circuit that has considered the issue has correctly concluded that *Austin*, in applying the principles first enunciated in *Halper*, determined that civil *in rem* orfeitures were meant, at least in part, to punish and that such punishment implicated the Double Punishment Clause of the Fifth Amendment as well as the Excessive Fines Clause of the Eighth Amendment.

B. The proceedings were separate.

The criminal and civil proceedings against respondents were as separate as they could be. The petitioner argues that a proceeding is impermissibly successive only if it occurs after the defendant/claimant's expectation of finality has ripened in the prior proceeding. Pet. Br. 55-56. This argument fails to acknowledge the literal protection afforded by the Double Jeopardy Clause. The plain language of the Clause limits the government's ability to seek punishments through multiple or successive proceedings.

"Expectation of finality," the government's linchpin, applies only to those instances where the government has sought to revisit a particular punishment after a singular verdict.[5] Finality,

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[5] "Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by

notwithstanding the government's elaborate recasting of this Court's recent decisions, does not play any role in determining whether a civil *in rem* forfeiture is itself separate from the criminal sentence, so that the defendant can be seen as "twice" facing risk of punishment. As set forth in Part A, *post*, the determinative characteristic of 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is punishment: both statutes impose punishment entirely separate from their corollary criminal offenses; both require new verdicts, not merely additional fact-finding; and neither is imposed as part of the original judgment of sentence. Timing, finality, and the order of proceedings do not alter this fundamental characteristic.

To be sentenced and then to have one's property forfeited is to be punished twice within the meaning of the Double Jeopardy Clause.

C. Respondents' forfeitures were for the "same offense" as respondent's prior convictions.

Forfeitures under 21 U.S.C. § 881 and 18 U.S.C. § 981 are punishments "as we have come to understand the term," not "offenses". *Austin v. United States*, 113 S.Ct. at 2812 (1993) quoting *Halper*, 490 U.S. at 448; and see *Libretti v. United States*, 516 U.S. ___, 116 S.Ct. 356,363 (1995) ("heightened procedural protections to imposition of criminal forfeiture as punishment . . . cannot alter the simple fact that forfeiture is precisely that: punishment"). The factual predicates of forfeiture are not the functional equivalent of the "elements of an offense"[6]; forfeiture is merely the imposition of a punishment and does not stand as an offense unto itself.

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the Constitution." *Ex parte Lange*, 85 U.S. at 173 (1873).

[6] The need for fact-finding at the punishment phase is well established: mail fraud prosecutions do not require a finding of victim loss, *United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1993) (Becker, J.), whereas the fact of victim loss must be proven before the sentencing court may impose restitution as a component of the sentence. Thus, predicates to punishment are not co-equal to the (predicate) elements of conviction, any more than *in rem* forfeitures are co-equal to their corollary offenses.

As a consequence, this Court has never applied the *Blockburger* "same elements" test to civil penalties, but has consistently examined whether the offense underpinning the civil penalty was the same as gave rise to the prosecution. See *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Halper*, 490 U.S. 435 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994). A *Blockburger* side-by-side elements comparison would be immaterial; the question is merely whether the forfeitures were sought for the same offense as the prosecution.

Respondents meet this test. The central justification for the government's forfeitures was predicated on respondents' commission of the offenses for which they were already serving life in prison. The forfeiture proceedings brought against respondents constituted punishment for the same offense because the government had incorporated the corollary criminal offenses into its summary judgment motion. Resp. Arlt's Br. in Opp.1a-29a.

Even if forfeiture is an offense in its own right, as the government argues, the *Blockburger* test would be met in this case. The forfeiture statutes wholly subsume the substantive criminal offenses set forth in Title 21 and the money laundering statutes; what is more, the government's forfeiture claims against Arlt's and Wren's property wholly subsume the respondents' previous criminal convictions. Under either *Libretti* or *Blockburger*, the government's campaign to forfeit respondents' property was an attempt to inflict a second punishment for the same offenses for which respondents were previously prosecuted.

ARGUMENT

THE *IN REM* FORFEITURE OF RESPONDENTS' PROPERTY PUNISHED THEM A SECOND TIME FOR THE SAME OFFENSE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

A. The *In Rem* Forfeiture of Property Including Drug Proceeds Pursuant to 21 U.S.C § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) Constitutes Punishment Under the Double Jeopardy Clause.

In its successful motion for summary judgment in the *in rem* forfeiture proceeding, the government advanced several theories. Principally, the government contended that the named property represented proceeds under 21 U.S.C. § 881(a)(6). The district court granted summary judgment, albeit for a number of reasons having little to do with proceeds *simpliciter*. (See Section 3, *post*); Pet. App. 75a-77a. For the following reasons the court of appeals correctly held that, even assuming the property was properly found to be proceeds, its forfeiture constituted a prohibited second punishment of the respondents for the same methamphetamine and money laundering offenses for which they were already serving life sentences.

1. The holdings in *Halper* and *Austin* were harmonious and demonstrate that the forfeitures in this case were punishment.

The forfeitures against respondents Wren and Arlt constituted punishment for the same reasons that led this court to hold that civil penalties and administrative taxes could be punishment. The forfeitures here cannot be distinguished, for the purposes of Double Jeopardy analysis, from the punitive effects of the sanctions imposed in *Halper* and *Austin*.

Halper teaches the following: when Congress intends that a civil statutory scheme be solely remedial and damages in fact bear a rational relationship to the government's actual loss, then the Government is entitled to "rough remedial justice or compensation" such as "reasonable liquidated damages." The result does not offend double jeopardy because it does not

amount to "punishment." *Halper*, 409 U.S. at 446.

On the other hand, a civil remedy which "authoriz[es] a supposedly remedial sanction" — but which do not roughly approximate the government's damages and costs — are punishment and may offend double jeopardy. *Halper*, 490 U.S. at 446.

Within the contours of that broad analytical framework, *Halper* stands for the proposition that a statutory penalty which Congress intended to be punitive, or which cannot be justified for solely non-punitive purposes, is punishment for double jeopardy purposes.

> Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in individual cases serves the goal of punishment.
>
> These goals are familiar. We have recognized in another context that punishment serves the twin aims of retribution and deterrence. See *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)(these are the 'traditional aims of punishment'). Furthermore, '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.' *Bell v. Wolfish*, 441 U.S. 520, 539 n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448.

Subsequently, in *Austin v. United States*, this Court utilized the *Halper* Double Jeopardy test to examine an Excessive Fines challenge and applied the test to civil forfeiture proceedings under 21 U.S.C. § 881(a)(4) and (a)(7). *Austin*, 113 S.Ct. at 2806. The Court held that the value of property forfeitable under those sections varies so "dramatically that any relationship between the government's actual costs and the amount of the

sanction is merely coincidental." *Id.* at 2812 n. 14. See also *Kurth Ranch*, 114 S.Ct. 1937 (1994) (focusing on the goals of the tax statute as a whole). Thus, *Austin* obviated the necessity of an accounting of the government's damages. Instead it relied on a three-prong approach to determine that civil *in rem* forfeitures categorically constitute punishment.

In *Austin*, this Court unanimously concluded that forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) are properly considered punishment for three reasons. First, nothing in those sections contradicts the historical understanding of forfeiture as imposing punishment. Second, those civil *in rem* forfeiture statutes focus on the owner's culpability by providing for a "innocent owner defense" and by tying forfeitures directly to the commission of a drug offense. Third, Congress understood those civil *in rem* forfeitures to serve the dual punitive goal of deterrence and punishment. *Austin*, 113 S.Ct. at 2810-11.

As a result of this Court's determination in *Austin*, there is no need for a further *Halper* inquiry regarding whether civil *in rem* forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) constitute punishment. To suggest otherwise simply argues, without the courage to say so, that the Court's opinion in *Austin* was wrong.

The government raises numerous concerns regarding this court's prior holdings in *Halper* and *Austin*, none of which find support in the language of the opinions or in the principles espoused in those cases.[7] The government boldly suggests that

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[7]For example, petitioner and one *amicus* argue that *Halper* would be better understood as an Excessive Fines case. Br. for Amicus 39 Counties. The notion springs from *Halper's* use of proportionality, which petitioner and amicus treat, without differentiation, as the equivalent of the Excessive Fine test. In *Halper*, proportionality refers to whether an otherwise remedial sanction serves rough justice, that is, whether a sanction's disproportionality rises to a level where it can be said to punish. The fact that a sanction is punishment, however, is distinct from whether it *necessarily* exceeds the Excessive Fines Clause. Pet. 15a, n. 8 and text. Similarly, *Kurth Ranch* shows that a second

there exists some tension between the "categorical" language in *Austin*, and the "case-by-case" approach adopted in *Halper*,; Pet. Br. 41. No such tension exists between these unanimous decisions.

The government's request that this Court disregard the *Austin* analysis to the Double Jeopardy Clause — and its suggestion, Pet. Br. 41, that such an application would defeat the *Halper* case-by-case approach — makes no sense. There is no contradiction between these two approaches. *Halper* mandates that all civil sanctions be examined to determine whether they serve retributive or deterrent purposes. *Halper*, 490 U.S. at 448. If that civil sanction does serve a retributive or deterrent purpose, as opposed to solely serving a remedial purpose, it is punishment for purposes of the double jeopardy clause. *Id. Austin* followed exactly what this Court previously mandated in *Halper*. Indeed, the *Austin* decision was based specifically on that prior holding.

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. 490 U.S. at 448, 109 S.Ct. at 1902.

Austin, 113 S.Ct. at 2806.

Therefore, *Austin* forecloses any further inquiry regarding civil *in rem* forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) in determining whether or not those sections constitute punishment. They do; what is more, the government has advanced no credible argument to support a wholesale rejection and overruling of this Court's recent unanimous holdings.

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punishment that is not excessive can nevertheless offend double jeopardy. *Kurth Ranch*, 114 S.Ct. at 1946-47 (tax rate's size did not render tax punitive).

The government's brief expresses fear that the extension of *Austin's* formulation to other contexts could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper. Pet. Br. 41. The concern is illusory. *Austin* focused on one statutory scheme, civil *in rem* forfeitures pursuant to 21 U.S.C. § 881. That its rationale may extend to other contexts is no reason to deny its compelling analysis. Even so, the government's fears are unfounded. Numerous civil sanctions have been determined to serve solely remedial goals. This Court has upheld fines and penalties based on the intent of Congress to formulate a remedial statute. Congress intended that these civil actions be solely remedial: *Helvering v. Mitchell*, 303 U.S. 391(1938), (tax deficiency and penalty based on tax loss and investigatory costs); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (*qui tam* recovery under 31 U.S.C. 3730(b) where the actual cost to the government roughly equaled the damages recovered); see *Halper*, 490 U.S. at 444, 445–46; *Rex Trailer Company v. United States*, 350 U.S. 148 (1956) (recovery of a specific related loss as to five surplus vehicles); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (liquidated damage provisions of customs forfeiture statutes were intended to be solely remedial); and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (illegal firearms).[8]

There is nothing inconsistent between this Court's prior decisions and its determinations in *Halper* and *Austin*. See *Austin*, 113 S.Ct. at 2804 n. 4. Therefore, the government's concern that the application of *Austin* to double jeopardy would cast unwarranted doubt on the constitutionality of practices that

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[8] *Amici*, too, sound the alarm but no more convincingly than the government. The prevalent practice of summarily suspending the licenses of drivers susptected of operating a motor vehicle while under the influence has been held to be sufficiently remedial so as to not implicate punishment nor double jeopardy concerns. Br. of MADD at 12-14. The use of equitable abatement, likewise, does not implicate punishment. *Bennis*, ___U.S. ___, 1996 WL 88269, No. 94-8729 (March 4, 1996) (Ginsburg, J.).

have long been thought proper is ill-founded. Before any civil fine or penalty can be held to be punitive to the extent that it implicates the Double Jeopardy Clause of the Fifth Amendment or constitutes punishment in any constitutional respect, it must continue to be examined in light of both *Halper* and *Austin*. *Austin* has simply foreclosed that inquiry as to civil *in rem* forfeitures pursuant to § 881(a)(4) and (a)(7), and rightly so.

The government also suggests that "[t]he extension of *Austin's* reasoning...to the double jeopardy setting "would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable." Pet. Br. 41.

This parade of horribles reflects a disingenuous disregard of the tremendous power the Government continues to wield under the criminal forfeiture statutes to obtain the same results it improperly sought in these civil proceedings. The anarchy suggested by the Government is pure puffery. Not only does the Government have the option of seeking both criminal prosecution and forfeiture in the same proceeding pursuant to 21 U.S.C. § 853(a)(2) and 18 U.S.C. § 982, but the Government may proceed with civil *in rem* forfeiture actions in the absence of a related criminal prosecution.[9] As a matter of fact, that may be the preferred process.

> Where the issues related to civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings . . . thus, a more efficient

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[9] The Government raises an interesting but false concern, that the "nuisance" of a crack–infested tenement could not be abated without having the civil forfeiture confer upon its fugitive owner a form of immunity. Pet. Br. 57 n.17. Forfeiting a nuisance is a remedial act whose sanction (unlike *Halper's* or Respondents) could, under the proper statutory language, be entirely justified by its remedial goals. In any event, this Court has rejected the notion that an equitable abatement of a nuisance would be deemed a punishment, *Bennis*, ___ U.S. ___, 1996 WL at 88269.

> mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used in the offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. [21 U.S.C. § 853] creates such a mechanism. S. Rep. No. 225, 98 Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. Admin. News 3182, 3393.

United States v. Littlefield, 821 F.2d 1365, 1367–68 (9th Cir. 1987). Thus, there is no bar to the government proceeding by way of criminal forfeiture which serves as the efficient alternative to civil forfeiture just as Congress intended. See also *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992).[10]

The government routinely includes forfeiture counts in its criminal indictments, see *Libretti*; *Alexander v. United States*, 509 U.S. 544 (1993), and, as the government itself points out, Pet. Br. 54, there is no double jeopardy bar to seeking multiple punishments in a single proceeding. See *e.g.*, *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983).[11]

3. *Halper* and *Austin* apply to proceeds.

The government contends that, even if civil forfeiture under other portions of 21 U.S.C. § 881(a) constitutes punishment, at least in part, a special dispensation from the scope of the Double Jeopardy Clause should be granted. This grant should benefit not all property forfeitable under § 881(a)(6), but only a single

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[10] Although the Government only addresses 18 U.S.C. § 981 issues in its *Blockburger* argument, Pet. Br. 51, and appears to have otherwise abandoned argument with respect to this statute, there are criminal forfeiture provisions under the Money Laundering Statute, 18 U.S.C. § 982, analogous to criminal forfeitures under 21 U.S.C. § 853, that incorporate the same procedures provided for in 21 U.S.C. § 853. See *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994).

[11] As *amicus* suggests, criminal forfeitures are not only more fair than their civil counterparts, they are also more efficient than bringing separate civil proceedings. Br. NACDL 22.

type of property described in one phrase in § 881(a)(6) as "all proceeds traceable" to an exchange for a controlled substance. 21 U.S.C. § 881(a)(6). Although the government devotes only three pages of its brief to this contention, Pet. Br. 48-50, this is a refrain which has become popular among courts seeking to avoid the application of *Halper* and *Austin* to the government's increasing use of dual criminal and civil forfeiture proceedings. See *United States v. Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S.Ct. 573 (1994); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995) (following *Tilley*); *United States v. Smith*, 76 F.3d 879 (7th Cir. 1996) (same). It is important, therefore, to give careful attention to what this purported exception to double jeopardy protection entails and to determine if it is justified.

Some courts, including those noted above, have been reluctant to enforce double jeopardy protections when faced with strong proof, or even outright admissions, of illegal drug activity. After all, we all live in the midst of a national "War on Drugs."

> We are not unsympathetic to the government's strong desire to eradicate drug trafficking: * * * We must not forget, however, that at the core of this system lies the Constitution, with its guarantees of individuals' rights. We cannot permit these rights to become fatalities of the government's war on drugs

United States v. $38,000 in United States Currency, 816 F.2d 1538, 1548-49 (11th Cir. 1987). Once the Fifth Circuit erroneously declared in *Tilley* that the forfeiture of drug proceeds "will always be directly proportional to the amount of drugs sold," *Tilley*, 18 F.3d at 300, and therefore, arguably purely remedial, the temptation was great to disallow double jeopardy claims on this basis. The government has been quick to assert "proceeds" as a talisman in place of analysis to avoid double jeopardy's bar to further punishment. Thus, in one case, a court has applied the "proceeds" shield to a double jeopardy claim, based on no more than the appearance in the government's pleadings of a "proceeds" theory of forfeiture, wholly unsupported by any evidence. See *Salinas*, 65 F.3d at

553-54 & n. 1.[12]

Yet, as this court has observed, the notion of punishment cuts across the application of simple labels, and courts "must follow the notion where it leads." *Halper*, 490 U.S. at 448. And the prohibition of second punishments is "within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence.'" *Kurth Ranch*, 114 S.Ct. at 1948, (quoting *Halper*, 490 U.S. at 440). Those who drafted and adopted the Fifth Amendment certainly understood that its application would benefit those who had engaged in criminal conduct and had been convicted of serious offenses.

Since the decision in *Halper*, the government has continued to vigorously pursue dual criminal and civil forfeiture actions, ignoring that neutral, common sense analysis would find punitive aspects in all forfeitures under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). In the face of direct warnings from the courts and legal writers, the government sought refuge behind legal fictions and superficial labels. See *e.g.*, *United States v. Michelle's Lounge*, 39 F.3d 684, 696 (7th Cir. 1994) ("The use of parallel proceedings (cites ommitted) a civil forfeiture to restrain assets and obtain discovery, followed by a criminal indictment that stays the civil case [cite omitted] sometimes sets these two regimes

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[12] The *Salinas* court stated: "The forfeiture proceeding was based on the *theory* that the car was proceeds because it was purchased with drug money, Salinas' only source of income. Since Salinas failed to contest the proceeding in any way, he is estopped from now challenging the theory under which the vehicle was forfeited." *Salinas,* 65 F.3d at 553, n. 1 (emphasis added). No authority was given for such a novel application of estoppel. In his concurrence, Judge Wellford forthrightly admitted: "*Tilley* presents several problems in application. * * * [I]f the government had sought forfeiture of Salinas' automobile on the grounds that he used the car to carry narcotics from Texas to Michigan, [the Sixth Circuit's prior decision in] *Ursery* [59 F.3d 558 (1995)] might have barred this criminal prosecution. Thus, after *Ursery* and our decision today, double jeopardy protection will often depend on which theory the government utilizes to justify the civil forfeiture." *Id.* at 554.

on a collision course"); T. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991) (legal fiction that forfeiture is an action against a "guilty" *res*, not the property owner, obscures the punitive aspects of forfeiture). Now the government attempts to use the new label of "proceeds" to avoid constitutional prohibitions. Yet even the most strict view of double jeopardy protections acknowledges that the forfeiture of currency (or other non contraband) is a "taking of lawful property" which "must be considered, in whole or in part, punitive." *Austin*, 113 S.Ct. at 2813 (Scalia, J., concurring in part and in the judgment).

As the following analysis shows, no sound basis exists for applying the Double Jeopardy Clause differently to alleged proceeds than other types of forfeitable property.

The statutory scheme treats "proceeds" in exactly the same manner as other types of property subject to forfeiture. Thus, a conveyance used to facilitate drug transportation, § 881(a)(4); real property used to facilitate drug transactions, § 881(a)(7); money furnished in payment for drugs; § 881(a)(6), money intended to be used to facilitate drug activity, § 881(a)(6); and proceeds traceable to a drug exchange, § 881(a)(6); all are subject to § 881(a) as property that "shall be subject to forfeiture to the United States and no property right shall exist in them." 21 U.S.C. § 881(a)[13].

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[13] 21 U.S.C. § 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to

As the lower court made clear, 21 U.S.C. § 881(a)(6) encompasses more than profits or proceeds. "Rather than rendering only the *profits* of drug dealers subject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion." Pet. App. 20a-21a.

The analysis in *Austin* which concluded that § 881(a)(4) and (a)(7) were at least in part punitive in nature applies with equal force to § 881(a)(6) categories of property. § 881(a)(6) contains an "innocent owner" defense which is identical to that contained in § 881(a)(7). Thus, both provisions focus "on the culpability of the owner in a way that makes them look more like punishment, not loss." *Austin*, 113 S.Ct. at 2811.[14] All three subsections "tie forfeiture directly to the commission of drug offenses." *Id.* And the legislative history of § 881 related in *Austin, id.*, confirms that the types of property described in 881(a)(6), including proceeds, were just as surely a product of congressional intent to advance the punishment and deterrence of the drug trade as was subsection (a)(7). See *United States v. 9844 South Titan Court*, 75 F.3d 1470 (10th Cir. 1996) (noting that the government "suggests no reason to treat [§ 881(a)(6)]

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have been committed or omitted without the knowledge or consent of that owner.

The statute makes no distinction among these types of property. See *Kurth Ranch*, 114 S.Ct. at 1946 ("forfeitures are readily characterized as sanctions").

[14] In *Bennis v. Michigan*, ___ U.S. ___, 1996 WL 88269 (March 4, 1996), this Court revisited the *Austin* analysis of the significance of the statutory "innocent owner" defense.

> In *Austin*, the Court held that because "forfeiture serves, at least in part, to punish the owner," forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines. 509 U.S. at __, 113 S.Ct. at 2810. There was no occasion in that case to deal with the validity of the "innocent-owner defense," other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is "punitive" in motive. *Id.*, [ ] 113 S.Ct. at 2809-2810.

___ U.S. ___, 1996 WL 88269, at *6 (emphasis added).

differently in terms of its intent, effect, or legislative history").

The government notes that the forfeiture of proceeds is "a recent development in forfeiture law." Pet. Br. 48. Its recent inclusion in the language of § 881(a), however, has no bearing on whether it is intended to be punitive. Indeed, this Court observed in *92 Buena Vista Avenue* that the 1978 amendment authorizing the forfeiture of drug proceeds marked "an important expansion of government power." *United States v. 92 Buena Vista Avenue* , 507 U.S. 111, 121 (1993). As *Austin* noted, the punitive purpose which prompted congressional action in 1978 had not waned with the amendments of 1984. *Austin*, 113 S.Ct. at 2811 (citing Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes")).[15]

For example, *Austin's* historical determination was not affected by the fact that prior customs laws, piracy laws, and revenue laws themselves contained no innocent owner defense. Indeed, like the proceeds provisions, that defense is a recent statutory creation that supports the conclusion that the statutes are punitive. *92 Buena Vista Avenue*, 507 U.S. at 122-123. Thus, despite their recent vintage, this Court found that forfeitures under § 881(a)(4) and (a)(7) were punishment, even though "[u]nlike traditional forfeiture statutes, § 881(a)(4) and (a)(7) expressly provide for an 'innocent owner' defense." *Austin*, 113 S.Ct. at 2810; see also *Bennis*, ___ U.S. ___, 1996 WL 88269, at *6. Significantly, it is the very fact that the forfeiture statutes in this case do not have a traditional remedial

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[15] Congress clearly had punishment in mind when, in 1978, it added subsection (a)(6) to § 881. The legislative gloss noted that "due to the penal nature of forfeiture stautes," property should only be forfeited if there is a "substantial connection between the property and the underlying criminal activity." 124 Cong. Rec. 34,661 (1978). Congress intended forfeitures pursuant to § 881(a)(6) to constitute punishment, and under the *Austin* three-part analysis, there exists no reason whatsoever to distinguish § 881(a)(6) from (a)(4) and (a)(7).

pedigree, but have origins in congressional action seeking to enhance drug penalties, that their punitive purpose is revealed. No remedial objectives are mentioned anywhere in the legislative history of the Comprehensive Drug Abuse and Prevention Control Act of 1970, nor in the amendments to that act which are at issue here. Largely because of the contemporary genesis of these forfeiture provisions, there is no question that forfeitures under 21 U.S.C. § 881(a)(6) and under 18 U.S.C. § 981(a)(1)(A) are properly considered punishment.

3. Forfeiture under 18 U.S.C. § 981 also involves punishment.

The government's motion for summary judgment was also based on an application of 18 U.S.C. § 981(a)(1)(A) which provides for forfeiture of property involved in various currency and money laundering violations.[16]

In this Court, the government has offered no analysis and has apparently abandoned all argument with respect to § 981.[17] The government's abandonment is proper. As applied to the double jeopardy analysis of civil punishment, however, the statute functions virtually identically with the analogous § 881 forfeiture statute.

The term "proceeds" does not appear anywhere in § 981(a)(1)(A). The sweep of § 981 is extremely broad, including any property "involved in" an illegal money laundering

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16 18 U.S.C. § 981(a)(1) provides in part:

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture in the United States:

(A) Any property, involved in a transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

17 Except as to the "same offense" test under the government's *Blockburger* theory, see part C, *post*.

transaction. Indeed, the government argued to the Ninth Circuit against any limitation of § 981(a)(1)(A) to proceeds. Pet. App. 21a. Such a limitation, the government argued, would undermine the purpose of the forfeiture statutes because money laundering largely depends upon the use of legitimate monies to advance or facilitate a money laundering scheme and the government sought these monies as well as ill-gotten proceeds. The government's position has historically been that forfeitures under § 981(a)(1)(A) are expressly not limited to proceeds. Pet. App. 21a and n. 12, Government's Memorandum of Contentions of Fact and Law.

4. This case does not involve only proceeds and cannot be decided solely upon an analysis of proceeds forfeiture.

Although the government's brief argues that the property in $405,089 represents proceeds, the government cannot fairly "claim that this case involved *only* the forfeiture of illegal proceeds." Pet. App. 21a (emphasis in original). Indeed, the government implicitly concedes this in its brief: "The district court in [this] case granted summary judgment...on the ground, *among others*, that the assets at issue were 'proceeds' of narcotics trafficking." Pet. Br. 48 (emphasis added). The district court granted summary judgment in favor of the government in a terse one sentence order encompassing all of the defendant properties and accepting all of the government's arguments. Pet. App. 76a and 77a. That court's order was not based on a proceeds theory. The government's summary judgment motion, in fact, sought forfeiture for significant non-proceeds reasons, including that there were "financial transactions designed to conceal the location, source, or the ownership of defendant properties," Pet. App. 68a, there was property "used to 'facilitate' illegal money laundering" pursuant to 18 U.S.C. § 981(a)(1), Pet. App. 70a–71a, and that legitimately obtained funds, to the extent they were commingled with forfeitable funds, were forfeitable. Pet. App. 71a.

In opposition, respondents Arlt and Wren vigorously

disputed the government's alleged "uncontroverted" facts, showing that for every cash transaction requiring it, they had filed a proper Currency Transaction Report (CTR) and IRS 1099 forms, Resp. Arlt's Br. in Opp. 43a, that all cash transactions were legal in themselves, and that all of respondents' properties had been acquired in a legal manner with lawful funds. Resp. Arlt's Br. in Opp. 31a–52a. The district court's ruling did not discuss why it rejected these arguments, but it is clear from the foregoing that the order was not based solely on a "proceeds" theory.

5. Proceeds are not "contraband" and their forfeiture is not solely remedial.

United States v. Tilley and those cases following it adopt the view that the forfeiture of drug "proceeds" is, by definition, purely remedial, and therefore outside the scope of the Double Jeopardy Clause. *Tilley*, 18 F.3d at 298-99. Close analysis reveals, however, that Tilley and its progeny are based upon seriously flawed reasoning and are unfaithful to the principles of *Halper* and *Austin*.[18]

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[18] Not only does *Tilley* contradict it's own prior decision in *Wood v. United States*, 863 F.2d 417, 421 (5th Cir. 1981) (holding that § 881(a)(6) forfeitures cannot seriously be considered anything other than punishment), but the same Fifth Circuit later conceeded that the *Austin* court specifically eliminated the necessity of the *Halper* case-by-case approach in the forfeiture setting and that the logic of *Austin* applies to the Double Jeopardy Clause. *United States v. Perez*, 70 F.3d 345, 349 (5th Cir. 1995). Thus, the Fifth Circuit stands in the anomalous position of conceeding the *Austin* categorical approach that § 881(a)(4) and § 881(a)(7) civil forfeitures constitute punishment not only for Eighth Amendment purposes, but also for Fifth Amendment Double Jeopardy purposes, yet holding that § 881(a)(6) forfeitures are "distinctly different". *Id.* 349. And, of course, given the broad language of § 881(a)(6), what the Fifth Circuit must really have meant is that *most* § 881(a)(6) forfeitures constitute punishment for double jeopardy pusposes, but only those which are proven to be the type of forfeitures described by one word in the statute — proceeds — are not afforded the same double jeopardy protection. There is no principled way to support such an argument.

Tilley first asserted that the forfeiture of proceeds was solely remedial because it was repayment for the social cost of the illegal activity and the cost of investigating and prosecuting the criminal conduct. *Id.* The underpinnings of this proposition are built upon shifting sand. If forfeiture is meant to repay all of society's costs of drug abuse, it necessarily follows that the individual property owner is required to pay for the acts of third parties for which he is not directly responsible, much less able to control. That suddenly sounds very much like punishment; and it also fits very neatly within the definition of constituting "payment to a sovereign as punishment for some offense," i.e. a penalty, not something purely remedial. *Browning-Ferris Industries v. Kelso Disposal, Inc.*, 492 U.S. 257, 265 (1989). The government did not attempt to show in the court below, nor does it now claim, that the forfeiture in this case "approximates the cost of investigating, apprehending, and prosecuting" the respondents, or "that it roughly relates to any actual damages that they caused" the government. *Kurth Ranch*, 114 S.Ct. at 1948. This Court, in dealing with *in rem* civil forfeitures, has already rejected the "repayment to society" rationalization, holding that the value of the properly forfeited under those sections varies so dramatically that any relationship between the government's actual costs and the amount of the sanction is merely coincidental. *Austin*, 113 S.Ct. at 2812, n. 14.

Additionally, as the Tenth Circuit noted in rejecting *Tilley's* analysis:

> The difficulty with the "repayment to society" argument is that it applies as readily to all § 881 forfeitures as it does to the forfeiture of drug proceeds. If the "remedy" effected by forfeiture is understood broadly enough to encompass not only direct governmental losses, ... but also the nearly incalculable "social costs" of an entire class of legal conduct, then all forfeitures are purely remedial. This conclusion is inconsistent with the Supreme Court's analysis in *Austin*.

Titan Court, 75 F.3d 1470, 1485 (1996).

Tilley's second claim is that "the forfeiting party loses

nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300. It is suggested that forfeiting drug proceeds is analogous to seizing stolen money from a bank robber "who is arrested as he exits the bank." Pet. Br. 48. See *United States v. Smith*, 76 F.3d 879, (7th Cir. 1996); citing *Tilley*, 18 F.3d at 300.

The problem with the bank robbery analogy is that restitution to the bank, the lawful owner of the stolen money, is totally different from requiring payment (i.e., forfeiture) "to a sovereign ... for some offense." *Browning-Ferris Industries*, 492 U.S. at 265. The bank robber has no right to possess or pass good title to money stolen from a bank. Restatement 2nd of Torts, § 871 (1977). The Fifth Circuit asserted in *Tilley* that "the forfeiting party loses nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300. Yet, as the Tenth Circuit observed in *Titan Court*:

> *Tilley* does not state, and we do not find, any class authority for the proposition that legal ownership of drug proceeds is impossible. In fact, drug proceeds are ownable by anyone who can establish an innocent owner defense. *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 128, 113 S.Ct. 1126, 1137,122 L. Ed. 2d 469 (1993). Thus, even a noninnocent possessor of such proceeds must own them insofar as he can alienate them. We must conclude that the proposition that drug proceeds may not be owned is false as a statement of law.

Titan Court, 75 F.3d at 1485-86.

The government's attempt to also characterize forfeitures under 21 U.S.C. § 881(a)(6) as contraband is a rehash of the same argument rejected by this Court in *Austin*.

> Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 104 S.Ct. 1099, 1105

> (1984). The Court however, previously has rejected the government's attempt to extend that reasoning to conveyances used to transport illegal liquor. The same, without question, is true of the properties involved here.

113 S.Ct. at 2811. Contraband cannot be created by judicial fiat, but only by legislative action. See *Trupiano v. United States*, 334 U.S. 699 (1948). This Court has consistently rejected the characterization of conveyances or instrumentalities as contraband. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("there is nothing even remotely criminal in possessing an automobile"); see also *Austin*, 113 S.Ct. at 2811 (citing *One 1958 Plymouth Sedan).*

Although the forfeiture of clearly-defined contraband is remedial because it removes dangerous or illegal items from society, the same is not true as to property described in 21 U.S.C. § 881(a)(6) or 18 U.S.C. § 981(a)(1)(A). None of those properties are dangerous in-and-of-themselves nor illegal in-and-of-themselves. Characterizing them as contraband or "the functional equivalents of contraband", Pet. Br. 50, expands that concept far beyond its historical meaning. Money, or other property, which represents proceeds of some criminal activity or which represents the investments of alleged proceeds does not become contraband simply because of its origin. To adopt such a rule would be devastating, a concern recently expressed by Justice Stevens in his dissent in *Bennis v. Michigan*, ___ U.S. ___, 1996 W.L. 88269 *14, n.1.

From that perspective, it is clear that 21. U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) property is not contraband, since the statue gives the legal right to anyone to own such property subject to forfeiture, including proceeds. This right of ownership is *substantial*, allowing a possessor or owner of forfeitable property to alienate their interests to either a *bona fide* purchaser or a donee. *92 Buena Vista Avenue,* 113 S.Ct. at 1137. This property right to forfeitable property is greater than the right of one who might obtain property through fraud, where

such a person has a voidable title but can pass good title only to a bona fide purchaser for value. Restatement (2nd) of Contracts § 163 (1979); *Langley v. FDIC*, 484 U.S. 86, 93-94 (1987). Thus the argument that a possessor or owner of drug proceeds has no property right in such "contraband" is false as a matter of law.

Consider, for example, a person taking a $10,000 bank loan in order, surreptitiously, to finance the purchase of cocaine on the wholesale market. The intention is to sell the drugs at retail, anticipating $15,000 in gross receipts. This initial $10,000 is not contraband, though it is subject to forfeiture under § 881(a)(6). It is equally in error to contend that title to the currency vested in the government upon the intention to use the loan or even upon the commission of the drug transaction itself. Despite the language in § 881(a) that "no property right shall exist" in the types of property described in (a)(1) through (a)(7), the government must first obtain the forfeiture before all rights are extinguished. The government advanced its relation back "no property right" argument in *92 Buena Vista Avenue*, where this Court rejected it out of hand.

> [The government] contends that [respondent] never had been the owner of this parcel of land because the statute vested ownership in the United States at the moment when the *proceeds* of an illegal drug transaction were used to pay the purchase price. In support of its position, the Government relies on both the text of the 1984 amendment to the statute, and the common law relation back doctrine. We conclude, however, that neither the amendment nor the common law rule make the Government an owner of property *before* forfeiture has been decreed.

92 Buena Vista Avenue, 507 U.S. at 123-124 (emphasis added). As *92 Buena Vista* made clear: "Until the Government does win such a judgment [of forfeiture], ... someone else owns the property." *92 Beuna Vista Ave.*, 507 U.S. at 126, 132-135 (Scalia, J., joined by Thomas J., concurring in the judgment)

(title vests in the government if forfeiture is decreed). Otherwise, the innocent owner defense is rendered meaningless.

7. Forfeiture of proceeds is not a disgorgement of unjust riches but deprives the defendant of property rights in excess of illicit profits.

As shown in the previous section, *Tilley* and its progeny place great weight in the contention that "the forfeiting party loses nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300, citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 & n.6 (1956) (explaining that the civil sanction imposed there might avoid unjust enrichment). The *Tilley* court, however, misses the point. *Rex Trailer* involved a scheme to defraud the government at the expense of veterans whom the government intended to benefit.

> Unjust enrichment typically involves the illicit enjoyment of a benefit taken from its rightful owner. Restatement of Restitution 1 (1936). The force of the equitable analogy is diminished where, as here, there simply is no rightful owner to whom the money may be returned.

Titan Court, 75 F.3d at 1486.

In a dramatic example of misplaced reliance, the Seventh Circuit in *Smith* found support in *S.E.C. v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994), for its conclusion that forfeiture of proceeds is purely remedial under a disgorgement theory. *Smith*, 76 F. 3d 879, 882-83 (1996), with an argument which the government now espouses. Pet. Br. 49. This misplaced reliance underscores a central fallacy in the government's contention regarding the remedial nature of forfeiting proceeds.

In *Bilzerian* the circuit court dealt with a double jeopardy claim based upon an order, following conviction and sentencing for multiple securities laws violations, that the defendant disgorge the illicit profits of his illegal stock manipulation. *Bilzerian*, 29 F.3d at 693. Bilzerian's claim that the disgorgement order constituted double jeopardy was rejected because "the disgorgement order is remedial in nature and does

not constitute punishment within the meaning of double jeopardy." *Id.* at 698. Significantly, the court explained:

> The [district] court was careful to order disgorgement of the profits caused by Bilzerian's securities viola-tions only. For the shares purchased after his securities violations occurred, the court subtracted Bilzerian's purchase price from the price at which he later sold the stocks based on the theory that all appreciation occurring after his violations was due to his illegal actions.

Id. at 697 (emphasis added). The implication of the court's explanation is that a disgorgement order that did not go to lengths to distinguish net profits derived from illegal transactions from all other funds would constitute, at lease in part, a punitive measure.

Herein lies the rub. As one court put it: We "strongly suspect that the framers of the Double Jeopardy Clause were much more concerned about the reality of punishment than the focus of proceedings." *United States v. Aileman*, 893 F. Supp. 888, 899 (N.D. Cal. 1995). The government's view of proceeds forfeiture as devoid of any measure of loss or punishment to the property owner flies in the face of economic reality. Drug transactions are, after all, finite economic events albeit illegal. Thus, there is necessarily some investment of capital and of labor in the economic endeavor. *Bilzerian* took these factors into account, limiting the disgorgement to net profits; the courts in *Tilley*, *Smith*, or *Salinas* did not. Thus, to say that proceeds forfeiture is purely remedial is simply wrong and in contravention of economic reality.

Yet, beyond the forgoing, there is a far more subtle and sinister message contained in the government's suggestion here. It is the hope that those facing punishment and those who are threatened with the loss of their property deserve *less* constitutional protection than others. Such a proposition is the antithesis of the founding principles of this country. The Bill of Rights was enacted to protect the very same people as those now before this Court — those who stand accused and those who

stand to lose their property interests to the government. The Double Jeopardy Clause component of the Fifth Amendment stands to protect against the exact kind of sanction sought here — separate proceedings which lead to successive punishment with retributive goals for the same conduct.

For all the above reasons respondents submit that *Tilley* and those cases following it failed to apply the analysis mandated by *Austin*. Forfeiture of drug proceeds under § 881(a)(6) contains some punitive aspects, as do all forfeitures brought under § 881(a)(4), (7) or 18 U.S.C. § 981(a)(1)(A). The Double Jeopardy Clause is implicated.

B. The Government's Use of Separate Forfeiture Proceedings to Inflict "Successive Punishment" Violated Respondents' Protection Against Double Jeopardy

The court of appeals correctly determined that the two forms of punishment imposed upon the respondents in this case were necessarily imposed in separate proceedings which in fact placed the repondents twice in jeopardy.

The petitioner argues that, lacking an expectation of finality at the time of sentencing, the respondents were not separately punished by the subsequent forfeitures. This argument ignores precedent, policy, and common sense. The government has lopped off all that does not neatly fit its procrustean theory. In particular, the government ignores the very doctrine intended to prohibit the government's precise litigation strategy against respondents.

1. The criminal prosecution and civil forfeiture proceedings in this case cannot be merged into a single proceeding.

One consequence of the Constitution's bar on being "twice" placed in jeopardy is the doctrine that all punishment for a certain offense must be imposed in a single proceeding. The protection is not against multiple punishments, as such, but against

multiple punishments imposed in separate proceedings: that is, against successive punishments. If double jeopardy protects against successive punishments, what justifies the government's "coordinated prosecution" methodology in the face of double jeopardy claims? The government's answer is that the two proceedings are really only one. Pet. Br. 54.

The government's justification relies on cases where the defendant in effect consented to additional proceedings,[19] and on the theory that government "oppression of the sort against which the Double Jeopardy Clause was intended to protect" amounts to no more than an abuse of the defendant's legitimate expectation of finality. Pet. Br. 57. As the record makes clear, respondents were not the architects of the successive proceedings; the government was. The consent cases therefore do not avail the government's argument. Furthermore, the abuse protected by the Clause far exceeds mere expectations of finality, and putting the modifier "legitimate" into the calculation merely begs the question — when *can* the government be said to be done with the business of punishing?

Common sense dictates that a civil forfeiture proceeding and a criminal prosecution can *never* be the same proceeding for double jeopardy purposes. Under the government's theory, it could commence two prosecutions of the same person on the same criminal charges at on about the same time, either in two districts or before two judges of the same district, and pursue both of them to completion and sentence, without violating the Double Jeopardy Clause. First, the differences between a civil proceeding and a criminal proceeding prevent them from ever being anything but separate proceedings. As the Ninth Circuit concluded:

> We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided

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19 *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984); *Ohio v. Johnson*, 467 U.S. 493, 500-01 (1984).

> over by different district judges, and resolved by separate judgments, constitute the same "proceeding." In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding."

Pet. App. 8a. See also *United States v. Torres*, 28 F.3d 1643 (7th Cir.), cert. denied, 115 S.Ct. 669 (1994) ("[t]wo trials, even if close in time, are still double jeopardy").

As the government correctly notes, Pet. Br. 55, the Constitution does not prohibit the government from securing the full range of authorized penalties — forfeiture and incarceration — in the same proceeding. Since 1984, the government has had available criminal forfeiture statutes that Congress designed specifically in order to allow federal prosecutors to join the penalties in one proceeding:

> [t]he problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a *separate* civil suit.

S. Rep. No. 225, 98th Cong., 1st Sess. 196 (1983), reprinted in 1984 U.S. Code Cong.Admin. News 3182, 3379 (emphasis added). The specific provision for criminal forfeiture under 21 U.S.C. § 853 was predicated in part upon the understanding that civil forfeitures were separate proceedings from the corollary substantive prosecutions brought by the criminal division.

2. "Expectations of finality" are an inappropriate gauge of Respondents' double jeopardy interests.

The issue of a defendant's "expectation of finality", which the government claims controls all double jeopardy concerns, arises when the government appeals a punishment — which before *Halper*, meant a *criminal* punishment. See, *e.g.*, *United States v. Caterino*, 29 F.3d 1390, 1397 (9th Cir.), cert. denied, 506 U.S. 843 (1992); *Wilmer v. Johnson*, 30 F.3d 451, 456-57 (3rd Cir.), cert. denied, ___U.S.___, 115 S.Ct. 439 (1994);

and *United States v. Greenwood*, 974 F.2d 1449, 1473-74 (5th Cir. 1992), cert. denied, 113 S.Ct. 2354 (1993). The issue is whether the defendant has a *legitimate* expectation of finality in the sentence; the answer depends upon the government's having unsuccessfully sought a specific punishment at sentencing and its having the statutory power to appeal a sentence. See *United States v. DiFrancesco*, 499 U.S. at 132 (1980) (sentences have a lesser degree of finality than acquittals; there is no expectation of finality in a sentence that the government has the statutory power to appeal); *cf. Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990) (defendant had a legitimate expectation of finality in his sentence because the Arizona courts had no authority to modify the sentence).

The government argues that an appeal of a criminal sentence following a criminal prosecution is analogous to a criminal prosecution followed by a civil forfeiture: an appeal is brought before an appellate panel rather than a district court trial judge; appeals are assigned a different docket number; and they are often handled by a different government attorney. The government argues that, since these differences do not render an appeal "separate" from the trial, identical differences do not render a prosecutions "separate" from a civil forfeiture.

This superficial analogy to the typical pairing of criminal prosecution and civil forfeiture cannot survive analysis.

The analogy fails to grasp that a civil forfeiture proceeding and a criminal prosecution are not the logical equivalent of a criminal trial and a subsequent appeal. An appeal is a limited continuation of the lower court proceeding, while a civil forfeiture proceeding stands in no such relation to its corollary criminal prosecution. There is simply nothing about the sequencing of trial-then-appeal that makes it the functional equivalent of the combined use of civil forfeiture proceeding coupled along with, or serially to, a criminal prosecution. The Court in *DiFrancesco* permitted the government to seek

- an increased punishment;

- upon a single verdict,
- by exercising its statutory power to appeal from a ruling that denied the government the punishment it had legitimately sought in the intial sentencing.

United States v. DiFrancesco, 449 U.S. 117 (1980).

That the defendant-respondent in a sentencing appeal has no legitimate expectation of finality sheds no light upon the circumstances facing the individual respondents here.

The false analogy aside, absence of finality does not overcome the Double Jeopardy Clause's fundamental prohibition. The "successive punishments" threatened by tandem civil forfeiture and criminal prosecution breach the battlement erected against governmental overreaching:

> The basis of the Fifth Amendment protection against double jeopardy is . . . that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Abbate v. United States, 359 U.S. 187, 198-99 (1959); and see *Kurth Ranch*, 114 S.Ct. at 1941.[20]

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[20] This Court has readily recognized the double jeopardy implication of the government's use of civil penalty proceedings to extract punishment. Most recently the Court addressed the problem in *Kurth Ranch*:

> This case presents the question whether a tax on the possession of illegal drugs assessed after the state has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against *successive punishments* for the same offense.

114 S.Ct. at 1941. Respondents recognize that proceedings under 21 U.S.C. § 881(a) and 18 U.S.C. § 981(a), are not "criminal proceedings" under the Sixth Amendment nor easily categorized as pervasively penal (*Kennedy/Ward*). This Court has shown, however, that double jeopardy protection is not limited to prosecutions (*Halper/Kurth Ranch*), nor does the text of the Fifth Amendment suggest that twice imposing jeopardy of punishment for the same offense is restricted to criminal prosecutions as contrasted with the Sixth Amendment.

The abuse is made more onerous by the interaction of the two litigations: each makes it more difficult for the target to defend agaisnt the other. The government's argument that there was no "ripened" expectation of finality in the criminal judgment and sentence, Pet. Br. 55, ignores this core protection of the double jeopardy clause. The inherent substantive differences between the two types of proceedings illustrates the abuse:

- the civil case proceeds on an indefinite track, while the criminal case must generally be resolved within Speedy Trial Act requirements;
- the civil case places the burden on the defendant, while the government bears the burden in the criminal case;
- according to some courts the government may rely upon hearsay in the civil case to establish its prima facie burden (probable cause), while the defendant has the right to confront accusers in the criminal case;
- the parties have virtually complete discovery in the civil case, while the criminal case is tried under minimal requirements for constitutional disclosure;
- the claimant must find and retain counsel for the civil case, while counsel can be appointed in the criminal case.

These functional differences virtually assure that the claimant/defendant will be forced to mount two separate and different defenses on two separate and different fronts.

3. The multiple punishment prong has traditionally focused on single verdict proceedings.

The Double Jeopardy Clause protects finality in the special case of multiple punishments arising from a single verdict. This special case has given rise to an entire subset of double jeopardy doctrine, most often grouped within the multiple punishment prong. The origin of the finality doctrine reveals its limited

application.

In *Ex parte Lange*, this Court held that the defendant could not be dealt sentences in excess of the statutory authority, nor could the trial court impose an additional sentence following the defendant's satisfaction of the original penalty. This second holding reveals the Court's concern regarding multiple punishment.

> The petitioner, then, having paid into court the fine imposed upon him . . . and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner *on that same verdict*? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

Ex parte Lange, 85 U.S. (18. Wall.) 163, 175 (emphasis added). The Court further explained that this prohibition was a consequence of the constitutional ban on multiple trials.

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced *on the same verdict*? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is *the punishment* that would legally follow the second conviction which is the real danger guarded against by the Constitution.

Ex parte Lange, 85 U.S. at 173 (emphasis added). Accord *United States v. DiFrancesco*, 449 U.S. 117 (1980) (government sentencing appeal is permissible over *Lange's* bar where an authorizing statute provided notice of the extended proceeding and the appeal is limited to a claim for authorized punishment sought but denied at the initial sentencing).[21]

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[21] Compare *Bozza v. United States*, 330 U.S. 160, 165–67 (1947) (no double jeopardy where fine added under mandatory statutory language; sentencing court had no authority to fail to

The fundamental purpose of the Double Jeopardy Clause is to prohibit the state — with all of its resources and power — from making repeated attempts to *punish* an individual for an alleged offense. *Green v. United States*, 355 U.S. at 187-188 (1957). As noted by this court in *Ohio v. Johnson*, 467 U.S. at 498-99 (1984), the Double Jeopardy Clause serves the corollary goal of protecting an individual from the "embarrassment, anxiety and expense" of repeated government attempts to punish. These are the "humane interests" served by the Double Jeopardy Clause's prohibition against multiple punishments. See *Halper*, 490 U.S. at 447.[22]

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include fine) with *In re: Bradley*, 318 U.S. 50 (1943) (receipt of fine terminated power of court to further impose punishment in *Lange* -type election of fine or inprisonment, even by ordering refund of fine).

22 The government argues that *Halper* was merely an extension of the *second* principle of *Ex Parte Lange*, i.e., the rule prohibiting re-sentencing once the defendant has a legitimate expectation in finality. Pet. Br. 27-28. This suggestion contradicts this Court's holding in *Halper* which was explicitly based upon the third protection addressed by the Double Jeopardy Clause and not, as the government would suggest, the protection against additions to a single sentence meted out from a single verdict.

> This court many times has held that the double jeopardy clause protects against three distinctive abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishment for the same offense. See *e.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 [ ] (1969). The third of these protections —*the one at issue here* — has deep roots in our history and jurisprudence.

United States v. Halper, 490 U.S. at 440 (emphasis added). See also *Witte v. United States*, 515 U.S. ___, 115 S.Ct. 2199, 2204 (1995).

4. Successive punishments meted out under civil *in rem* and criminal proceedings constitutes separate proceedings under the Double Jeopardy Clause.

This Court has already reviewed a double jeopardy case involving parallel civil and criminal proceedings. In *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), this Court described a highly coordinated, overlapping set of civil and criminal proceedings against marijuana growers as "separate proceedings." These separate attempts to penalize the Kurths were condemned, correctly, as "successive punishments."

The State of Montana sought to impose a tax on illegal drugs assessed after the defendants were prosecuted in state court. This Court accepted review in order to determine whether the tax "violated the constitutional prohibition against *successive* punishments for the same offense." *Kurth*, at 1941 (emphasis added).

Kurth Ranch involved four contemporaneous proceedings: a criminal prosecution, a civil forfeiture, a civil tax assessment, and a bankruptcy proceeding. The order of events in *Kurth Ranch* is similar to that faced by the individual respondents here. In *Kurth Ranch*, the criminal case and the tax proceeding—all plainly authorized by statute—were initiated months apart but were pending at the same time — yet this Court considered the proceedings to be separate. As observed by this Court, "[t]he raid put an end to the marijuana business and gave rise to four *separate* legal proceedings." *Kurth Ranch*, 114 S. Ct. at 1942 (emphasis added). This Court further observed:

> Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or indeed, if it had assessed the tax in the *same proceeding* that resulted in his conviction.

Id. 114 S. Ct. 1945 (emphasis added). Finally, the Court noted:

> Nor does the statute require us to comment on the

possibility of "multiple punishments" imposed in the same proceeding [citation omitted], *since it involves separate sanctions imposed in successive proceedings.*

Id. at 1947 n. 21 (emphasis added). As Judge Easterbrook observed: "[I]f as *Kurth Ranch* holds, a civil proceeding to collect a monetary penalty for crime counts as an independent "jeopardy," it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." *United States v. Torres,* 28 F.3d 1463, 1465 (7th Cir), cert. denied, 115 S.Ct. 669 (1994).

As in *Kurth Ranch*, the proceedings here were neither filed nor resolved simultaneously. Different courts and factfinders handled each proceeding. Each proceeding afforded the parties different rights and burdens. To find that these two cases, the civil forfeiture and the criminal prosecution, were somehow part of the "same proceeding" so as to find that the government did not seek to punish the respondents "twice", contradicts the black and white facts of the case as well as common sense. *Kurth Ranch* put the question to rest in its observation that the phrase "same proceeding" means "the same proceeding that resulted in [the] conviction." *Kurth*, 114 S.Ct. at 1945.

C. Respondents' Civil Forfeitures And Criminal Prosecutions Twice Punished Them "For The Same Offense.

The government argues that the *Blockburger* "same elements" test is not met with repect to either the controlled substance or money laundering violations. Pet. Br. 50-53. Because the government's argument relies upon a false premise, its conclusions are without merit.

1. Civil *in rem* forfeitures are not themselves "offenses" *per se* but are punishments.

The government wholly miscontrues this lesson and argues

against precedent, common sense, and even syntax that "civil *in rem* forfeiture amounts to an 'offense'." Pet. Br. 50. Construing civil forfeiture as an offense, the government artfully concludes that its "elements" are not the same as — or a lesser included offense of — the substantive criminal offense, thus purpotedly overcoming the *Blockburger* test. *Blockburger,* 284 U.S. 299 (1932). The argument proceeds from false assumptions.

Halper held, without equivocation, that civil sanctions, under appropriate circumstances, were "punishment as we have come to understand the term." *United States v. Halper*, 490 U.S. 435, 448 (1989).

As we have shown above in Part A and B, *ante*, the forfeitures against Respondents Arlt and Wren in this case were *per se* punishment. Nothing in *Halper* or *Austin*, or in any other opinion issued by this Court, suggests that forfeitures could be viewed as offenses, or that the test to determine when facially civil sanctions were pervasively penal (and therefore entitling defendants to greater due process protections) had been discarded.

The government's assertion that civil forfeiture is its own offense is, in essence, an attempt to characterize the proceeding as pervasively penal pursuant to *Kennedy v. Martinez-Mendoza*, 372 U.S. 144 (1963) and *United States v. Ward,* 448 U.S. 242 (1980) yet distinct from the corollary substantive offenses in Title 21. This straw-man argument rewrites decades of this Court's guidance. Double jeopardy is offended not because the civil sanction is a separate prosecution, or a pervasively penal proceding, but because its sanction is punitive either through its disproportionality to the government's actual losses or because the sanction was aimed at deterrence and retribution *ab initio.*

2. The Court has never applied *Blockburger's* "same elements" test in the forfeiture context.

In *United States v. Halper*, a unanimous Court applied a factual test to determine whether double jeopardy was offended. *Halper,* 490 U.S. 435 (1989). The government's attempt to seek

criminal and civil penalties in separate proceedings parallels the two-front strategy used against rsespondents. The Court neatly focused on the facts of Halper's conviction and read the civil sanction as further penalty for the same offense punished in the criminal proceeding:

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the *same conduct*, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated . . . In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action *based on the same conduct.*

Halper, 490 U.S. at 450-51 (emphasis added). The analysis of "same conduct" in the case of civil penalties is entirely distinct from the analysis's brief and ill-fated application in criminal cases.[23] In the civil penalties context, as distinct from the criminal setting, *the Court is not comparing two offenses.* Rather, the Court has examined whether the defendant's acts giving rise to the civil sanction constitute the same offense as was brought in the criminal prosecution. Only one offense is present; the only task is to determine whether the civil punishment was sought for the same offense as the prosecution.

Most tellingly, *Halper's* factual evaluation was *not* challenged following *Dixon* and the re-establishment of the "same elements" test for criminal offenses.[24] The Double Jeopardy clause's "same

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[23] *Grady v. Corbin*, 495 U.S. 508 (1990) (modifying *Blockburger* and announcing a "same conduct" test in multiple prosecution cases; overruled by *United States v. Dixon*, 509 U.S. 688 (1993)).

[24] Respondents do not suggest that *Dixon* is in error. In the criminal setting, the *Blockburger* "same elements" test is the appropriate analysis. As we demonstrate, however, *Blockburger* does not give us the appropriate guidance when analyzsing civil sanctions and their corollary criminal offenses. The phrase "same conduct," as used in *Halper* and *Kurth Ranch*, means nothing

offense" requirement is analyzed in the civil penalty context by following two inquires, one statutory, one factual. The factual question in this case is whether the forfeiture was premised on the respondents' conviction[25]; the statutory question is whether the criminal offense is subsumed within the civil sanction. If the answer to both questions is "yes" then the two proceedings contemplate punishments for the "same offense."

Additional evidence that a factual review applies to civil penalties is found in *Kurth Ranch* where this Court applied a "same conduct" analysis to a civil penalty/tax. No member of this Court questioned the application of the "same conduct" standard in civil proceedings. The majority framed the civil action issue in *Kurth Ranch* this way:

> This case presents the question of whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty *for the same conduct* may violate the constitutional prohibition against successive punishments *for the same offense.*

Kurth Ranch, 114 S.Ct. at 1941 (1994) (emphasis added). Thus the government's argument that the "same elements" test applies to respondents is inconsistent with this Court's decisions in *Halper* and *Kurth Ranch.*

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more than that the defendants must show that the civil sanction arises from the same facts as the "unit of prosecution" involved in the criminal proceeding. In a series of drug distributions, Tuesday's sale may support a forfeiture and Friday's separate sale a prosecution. If on all the facts of the case the two events are genuinely different units of prosecution then they are not the "same offense" for Double Jeopardy purposes.

[25] As shown above, where the facts underlying the forfeiture are distinct from the criminal prosecution double jeopardy is not violated. If the forfeiture was triggered by an offense other than the one for which the claimant was already punished, an additional punishment would not offend.

3. The factual or "unit of prosecution" approach is correct because forfeiture — even criminal forfeiture — is not an offense.

In *Libretti v. United States*, 516 S.Ct. 356 (1995) this Court held that criminal forfeiture was not an "offense" with elements but a "punishment." Similarly, civil forfeiture is not an offense — even syntactically this is obvious as one never speaks of a defendant being guilty of forfeiture or committing a forfeiture — it is a sanction. The *Blockburger* elements-of-the-offense test has no application to these circumstances.

4. In the instant case, the factual and statutory questions are easily resolved.

The trial court granted summary judgment in favor of the United States based upon the respondents' prior convictions for controlled substance and money laundering violations. The government's theory below asserted that the property was forfeitable because of the jury's verdict against respondents for the same charged offense as supported the forfeitures.[26]

Finally, it is apparent from the texts of the statutes themselves that 21 U.S.C. § 881(a)(6) and § 981(a)(1)(A) both authorize forfeitures only upon conduct which wholly subsumes the crimes for which respondents were convicted. The allegations which gave rise to respondents' forfeitures included the same allegations giving rise to their criminal prosecutions: i.e., violations of 21 U.S.C. § 841(a) (1) and § 846, plus 18 U.S.C. § 371 and § 1956.

5. Civil forfeiture and the underlying criminal offenses are a species of greater and lesser included offenses under the *Blockburger / Dixon* "same offense" test.

Even if respondents' forfeitures were an "offense," as the petitioner argues, they are offenses which wholly subsume the

26 The question is, What conduct did the government rely upon in its civil case? In Respondents' case, summary judgment was based on the very offenses that resulted in respondents' convictions and little else.

substantive criminal offenses set forth in Title 21 and the money laundering statutes. Consequently, the government's efforts to forfeiture respondents' property sought to inflict a second punishment for the same offenses for which respondents were previously prosecuted.

a. Under the *Blockburger* test,[27] two offenses are "different" only if each contains an element not present in the other. Otherwise, they are considered the "same offense" under the Double Jeopardy Clause which thus bars both additional punishment and successive prosecution of such offenses. *Dixon*. Because a lesser-included offense never has an element additional to its greater offence, the Double Jeopardy Clause forbids multiple punishment or prosecution of greater and lesser–included offenses.[28]

This Court has also held that the lesser–included offenses approach applies to statutory crimes in which one offense includes as an element a variety of possible lesser offenses. For example, in *Whalen v. United States*, 445 U.S. 684 (1980), the criminal code for the District of Columbia established that any one of six specified felonies could serve as a required element of felony-murder. Examining whether multiple punishment barred both a rape conviction and a felony murder conviction based upon the same rape, the Court held that this type of statute presents a situation no different from the typical greater and lesser-included offense paradigm. *Id.* at 694 ("[W]e are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense"). In successive prosecution cases, this Court has similarly called the underlying predicate

27 284 U.S. 299 (1932).

28 When one offense contains all the elements of another offense plus additional aggravating elements, the first offense is denominated the greater offense, and the latter is called the lesser included. Thus, the lesser included offense will have no elements distinct from the greater offense. In successive prosecution cases, it does not matter which prosecution comes first. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

felonies, "a species of lesser-included offense." *Dixon*, 113 S.Ct. at 2857; quoting *Illinois v. Vitale*, 447 U.S. 410, 420 (1980); accord, *Harris v. Oklahoma*, 433 U.S. 682 (1977). Thus, when a greater offense contains an element that may be satisfied by any number of discrete criminal offenses, this Court's teachings prevent an abstract approach that ignores the actual predicate crime charged in the case. Instead, *Blockburger* requires that the actual predicate crime charged in each case be inserted into the variable element of the greater offense. To require otherwise would eliminate any meaningful protection from the Clause.

b. Section 881(a)(6) provides for forfeiture of "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all [such items] used or intended to be used to facilitate any violation of this subchapter." Under this section, the combination of either actual or intended use with the three methods of use — payment, proceeds, or facilitation — yields six different predicate scenarios under which the government can seek forfeiture. As demonstrated above, the *Blockburger* test requires that the actual scenario charged by the government be examined for purposes of a double jeopardy analysis.

In this case, the government moved for summary judgment in the forfeiture proceeding alleging that the claimants' criminal convictions were a sufficient predicate to satisfying this element of forfeiture. Pet. App. 6a; Resp. Arlt's Br. in Opp. 113a-114a. Under the *Blockburger* principles discussed above, if the forfeitures are to be veiwed as a kind of "offense," then the claimants' criminal convictions are thus no more than "a species of lesser included offenses" in relation to the forfeiture, and hence, act as a bar to the prosecution of that claim. See also *United States Titan Court*, 75 F.3d 1470.

The government advances several arguments that the criminal statutes at issue contain additional elements to the

forfeiture statutes. ("The forfeiture statutes do not require proof of any particular crime, . . . the participation of the property owner . . . proof that the owner entertained a mental state required for a criminal conviction.") Pet. Br. 51-52. These arguments all simply ignore this Court's rule that the greater offense cannot be "abstracted from the 'element' of the violated condition." *Dixon*,113 S.Ct. at 2852 (1993). For example, the petitioner's argument that the forfeiture statute does not require the commission of any particular crime is akin the argument dismissed in *Harris v. Oklahoma*, 433 U.S. 682 (1977) where the Court held that a successive prosecution for robbery with firearm is not precluded by a felony-murder conviction predicated upon the same robbery with a firearm.[29] For the same cogent reasons this Court should reject the government's argument here.

Similarly, the government argues that forfeiture may be had even if the property was only "intended" to be used in a drug offense but before any crime had in fact been actually committed. Pet. Br. 52. Be that as it may, the fact is the government chose to seek forfeitures against Respondents based upon their criminal convictions. In this respect, the Court's discussion of this "species of lesser-included offenses" in *United States v. Dixon* is instructive. The *Dixon* defendants were prosecuted first for criminal contempt for violation of an existing court order, and later indicted for criminal offenses arising out of the same incidents underlying the contempt convictions. In applying the *Blockburger* test, the Court rejected the government's argument that the elements of contempt be applied in the abstract — knowledge of a court order and a willful violation of that order. Instead, the majority opinion examined the underlying court order to specify the elements of the "greater offense" of contempt in each case. For example, for

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29 Similarly, if the claimants were not prosecuted in the underlying criminal case, they obviously would not have a double jeopardy claim. Fundamentally, all the government's arguments "apply *Blockburger* at too abstract a level." *Titan Court*, 75 F. 3d at 1490 (1996).

Alvin Dixon, the trial court order directed the defendant not to commit "any criminal offense" while on release for another charge. A subsequent drug offense became the basis for both the contempt conviction and the later criminal indictment. The Court held that the court order, "incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several emunerated felonies." *Dixon*, 113 S.Ct. at 2857. As a result, the drug indictment did not contain any element not contained in his previous contempt conviction and this prosecution was therefore barred by Double Jeopardy.[30]

As with *Dixon*, this case requires an "anomalous" application of the *Blockburger* test: the greater-included proceeding is denominated as a "civil" case. See *Dixon*, 113 S.Ct. at 2855 (these cases are the "consequence of an historically anomalous use of the contempt power"). Here, because the statutory provisions for forfeiture denominate the "offense" as a civil wrong, they contain remedies for conduct that are not necessarily criminal. Nevertheless, this Court has applied constitutional protections to such "civil" forfeitures when the forfeiture involves a violation of a criminal statute.[31] Respondents faced no less: the goverment

30 In the companion case, Michael Foster was tried for various violations of a civil protection order ordering him not "molest, assault, or in any manner threaten or physically abuse" his estranged wife. He was later indicted by the grand jury based on a number of the same incidents from the contempt hearing. *Dixon* a1113 S.Ct. at 2853-54.

31 Civil forfeitures often reference a criminal violation, and such statutes are distinct from merely regulatory enactments. For example, this Court examined a Customs statute that authorized the forfeiture of property for regulatory violations, regardless of any underlying criminal conduct. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236 (1972) (per curiam). The absence of a criminal component reduced the owner's claim to constitutional protections. With respect to forfeitures predicated upon criminal violations, however, the law has long been otherwise:

> But as *Boyd v. United States*, 116 U.S. 616, 634 (1886),

sought to impose punishment in two successive proceedings, and the punishments depended upon the literal violation of the same offenses for which respondents were previously criminally tried, convicted, and punished.

The government seeks to escape from the scrutiny of the Double Jeopardy Clause in this case by cloaking its efforts to punish respondents twice as a merely civil pursuit of a civil remedy. Instead, the line of cases beginning with *Harris* and through *Dixon* require that the elements of this forfeiture include the actual underlying criminal offenses used by the government as the predicate for forfeiture. When examined in this light, the Ninth Circuit was correct in holding that if the Wren forfeiture can be called an "offense" at all, it was a greater offense of the criminal cases and was hence barred by the Double Jeopardy Clause.[32]

> makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes.

Id. n. 6. This precise analysis has been applied to modern *in rem* forfeitures. *One 1958 Plymouth Sedan v. Commenwealth of Pennsylvania*, 380 U.S. 693 (1965); *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971).

32 The government contends that forfeiture and the underlying criminal offenses are not greater and lesser-included offenses because this relationship does not exist unless "every violation of the statute defining the greater offense 'necessarily entails a violation of' the statute defining the lesser offense." citing *United States v. Woodard*, 469 U.S. 105, 107 (1985) (*per curiam*); *Brown*, 116 U.S. at 634; and *Schmuck v. United States*, 489 U.S. 705, 716, 719 (1989). However, none of these cases involves the classic *Harris* statutory scheme which involves a greater offense with a number of qualifying predicate crimes for a particular element. Obviously, once the predicate crime is inserted in the variable element, as these cases require, a violation of the greater offense will necessarily involve a violation of the lesser-included offense.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.[33]

Respectfully submitted.

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33 Petitioner seeks reversal. Respondents, however, raised issues other than the double jeopardy bar to their *in rem* forfeiture. The appellate court did not reach these other issues except in dicta regarding the lack of probable cause. Because other issues were not reached in the court below, the government's remedy, at most, would be a remand.